

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

JOSUE LEOCAL, :
Petitioner :
v. : No. 03-583
JOHN D. ASHCROFT, :
ATTORNEY GENERAL, ET AL. :

- - - - -X

Washington, D.C.
Tuesday, October 12, 2004

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 10:04 a.m.

APPEARANCES:
JOSEPH S. SOLLERS, III, ESQ., Washington, D.C.; on behalf
of the Petitioner.
DAN HIMMELFARB, ESQ., Assistant to the Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	JOSEPH S. SOLLERS, III, ESQ.	
4	On behalf of the Petitioner	3
5	DAN HIMMELFARB, ESQ.	
6	On behalf of the Respondents	23
7	REBUTTAL ARGUMENT OF	
8	JOSEPH S. SOLLERS, III, ESQ.	
9	On behalf of the Petitioner	48
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now
in No. 03-583, Josue Leocal v. John D. Ashcroft.

Mr. Sollers.

ORAL ARGUMENT OF JOSEPH S. SOLLERS, III
ON BEHALF OF THE PETITIONER

MR. SOLLERS: Mr. Chief Justice, and may it
please the Court:

Drunk driving offenses, while most serious and
regrettable, were never intended to be crimes of violence
under 18 U.S.C., section 16, triggering removal as an
aggravated felony. We are asking this Court to so
conclude and eliminate the disparity and patchwork of
decisions that are in the -- that are currently in the
circuit courts of appeals depending upon the vagaries of
where a removal proceeding is instituted.

The Court need not go any further than straight
statutory construction and the language of the statutes
involved. Indeed, the Florida DUI statute has only two
essential elements: driving while intoxicated and causing
serious injury.

18 U.S.C., section 16 --

JUSTICE O'CONNOR: I guess what bothers me about
this is that clause (b) of 18 U.S. Code, section 16 is --

1 it says the crime of violence means any other offense
2 that's a felony and, by its nature, involves a substantial
3 risk that physical force against the person or property of
4 another may be used in the course of committing the
5 offense. If someone drives while drunk, have they not
6 created a substantial risk of the automobile or the
7 vehicle causing personal or property damage to another?

8 MR. SOLLERS: Justice O'Connor, there certainly
9 is an increased risk of an accident.

10 JUSTICE O'CONNOR: A substantial risk if a
11 person is drunk.

12 MR. SOLLERS: Your Honor, I would agree that
13 there is a substantial risk of an accident if one is
14 driving drunk.

15 JUSTICE O'CONNOR: So how is it that we should
16 construe this provision in subsection (b)?

17 MR. SOLLERS: Your Honor, subsection (b) also
18 has the use of force as an element, and it is the use of
19 force that is the critical terminology here.

20 JUSTICE KENNEDY: Well, before you quite get
21 there -- and of course, that's where you -- you should go
22 and I don't mean to sidetrack you. But the phrase before
23 that is by its nature, so that we don't look at the
24 specific details of the offense. We look to the offense
25 itself. And if by its nature, as a generic matter, as a

1 categorical matter, there is a substantial risk, then
2 quite without reference to the particular facts of the
3 case, it seems to me that the statute applies. So you
4 have to address the by its nature as well.

5 MR. SOLLERS: Well, Justice Kennedy, I would --
6 I would indicate that it's the categorical approach that
7 this Court has indicated should be used in the Taylor
8 case, as well as the courts of appeals have applied the
9 categorical approach -- indeed, the Doe case in the First
10 Circuit did so -- to look at whether or not that element
11 is present in the underlying predicate offense. And the
12 element is the use of force.

13 JUSTICE SCALIA: Mr. Sollers, I thought your --
14 your response to the problem of (b) was that (b) also
15 requires not just -- not just a risk that there be
16 physical injury, but a substantial risk that physical
17 force against person or property be used. So it's still
18 the same terminology, using physical force. And the
19 question we have before us is whether that terminology
20 means it must intentionally be applied or could simply be
21 applied carelessly, negligently, as by someone who is
22 driving DUI. Isn't -- isn't that the -- the answer to
23 this.

24 MR. SOLLERS: Yes.

25 JUSTICE SCALIA: Or at least your -- your

1 proffered answer to the problem of (b).

2 MR. SOLLERS: Yes, Justice Scalia. Critical is
3 that the actor intended to use force. That is the
4 statutory construction here and it is clear, as you look
5 at the statutory scheme, that individuals who engaged in
6 an accident were not intended to be removed as aggravated
7 felons.

8 JUSTICE KENNEDY: Well, once again, do you have
9 to have intent in the particular case? Because the
10 offense must by its nature -- you mean by the nature of
11 the particular offense that this person committed or by
12 nature of the felony broadly categorized?

13 MR. SOLLERS: Your Honor, I think under the
14 categorical approach, you look to the essential elements
15 of the underlying offense. And I go back to the DUI
16 statute in Florida which does not have the element of the
17 use of force. Indeed, that statute is a strict liability
18 statute. It requires no mens rea whatsoever, does not
19 even require negligence for a conviction.

20 JUSTICE GINSBURG: Are you suggesting then that
21 it should vary from State to State whether the vehicular
22 homicide is a crime of violence, that we should look to
23 the particular State, so that people engaged in the same
24 conduct in one State will be subject to removal and others
25 will not?

1 MR. SOLLERS: Your Honor, Justice Ginsburg,
2 there are a number -- almost every State has a similar
3 statute to the one in Florida. Where there is a -- simply
4 a causation of injury, there's an enhanced penalty for a
5 drunk driving offense. Of course -- so I would suggest
6 that if this Court were to find, as we believe it should,
7 that the use of force is required for it to be an
8 aggravated felony, it would apply across all 50 States.

9 If one were to intentionally use force, there
10 obviously are other statutes that would capture it.
11 Intentional endangerment, for instance. If one were --

12 CHIEF JUSTICE REHNQUIST: People who are drunk
13 can intend to use force.

14 MR. SOLLERS: Absolutely, Your Honor. It's
15 absolutely the case that somebody could intend to use
16 force who is drunk, but again, there are other statutes,
17 more serious statutes, intentional endangerment, vehicular
18 assault, statutes such as that, that would pick up such an
19 action.

20 JUSTICE KENNEDY: What -- what about burglary?

21 MR. SOLLERS: Burglary is an offense that has
22 typically been looked at as a B offense. Even though I
23 will say that burglary has now been added as a specific
24 offense under the aggravated felony listing in the INA,
25 burglary is the offense that -- that is typically viewed

1 as one that causes someone to be in a position where they
2 will engage in a volitional act of force. In other words,
3 you break into a house, that's a volitional act in and of
4 itself, but then you are -- you have not used force
5 against a person, but you have put yourself in a position
6 where you are likely to intentionally use force against
7 someone you come upon.

8 JUSTICE KENNEDY: What about the risk of the
9 driver going the wrong way on a freeway?

10 MR. SOLLERS: That's absolutely --

11 JUSTICE KENNEDY: That's -- that's a substantial
12 risk, or it's a risk at least, of -- of drunk driving.

13 MR. SOLLERS: Absolutely, and so is --

14 JUSTICE KENNEDY: I don't see how that's
15 different from burglary.

16 MR. SOLLERS: I would suggest, Justice Kennedy,
17 that it's different because it is not a intentional use of
18 force. It is an accidental action. It is a diminished
19 mens rea. And again, you look, in order to determine
20 whether or not a crime of violence has occurred, at the
21 underlying elements of the statute, and this Florida
22 statute simply has no mens rea requirement whatsoever.

23 JUSTICE SOUTER: Well, is your -- is -- is your
24 argument really that there's got to be an intentional use
25 of force or an intentional use of force in order to

1 injure?

2 MR. SOLLERS: Our argument is that there has to
3 be simply the intentional use of force in order for it to
4 be a crime of violence.

5 JUSTICE SOUTER: Without looking -- without
6 looking to the -- to the consequence, to -- to the -- to
7 the result?

8 MR. SOLLERS: Well, that's correct, Justice
9 Souter.

10 JUSTICE SCALIA: He's intentionally driving a
11 car --

12 JUSTICE SCALIA: -- that's speeding along at 65
13 miles an hour. That's intentionally using force, surely.

14 MR. SOLLERS: Your Honor, I would suggest that
15 it's intentionally driving the car, but I would not agree
16 that it is the intentional use of force against a person
17 or property of another.

18 JUSTICE KENNEDY: What about 95 miles an hour?

19 MR. SOLLERS: Your Honor, there's a continuum,
20 and that may suggest recklessness, but again, this statute
21 that we're looking at, the Florida statute, does not
22 require recklessness. It does not require even
23 negligence. It's a strict --

24 JUSTICE GINSBURG: And you disagree --

25 MR. SOLLERS: Excuse me, Your Honor.

1 JUSTICE GINSBURG: -- you disagree with Ninth
2 Circuit that said negligence is not covered, but a
3 reckless state of mind would be covered.

4 MR. SOLLERS: Your Honor, I'm not necessarily
5 taking a position as to whether or not that's -- the Ninth
6 Circuit is accurate on that. What I am taking a position
7 on is the very statute at issue, which is the Florida DUI
8 statute, which has no negligence requirement, no negligent
9 -- or no recklessness requirement.

10 JUSTICE SCALIA: Yes, but we have to look down
11 the road to the next case. So, you know, you can't just
12 not answer that.

13 JUSTICE GINSBURG: And you just responded to my
14 question that it's the same in all 50 States. So either
15 it's peculiar to Florida or it's -- if I take your last
16 answer to be correct, it would be the same in all 50
17 States.

18 MR. SOLLERS: The analysis that we believe is
19 the correct analysis here is to look at the underlying
20 statute to see whether it has use of force, and this
21 statute has no such element. It -- and it has -- again,
22 it has no mens rea requirement.

23 Now, interestingly, the Ninth Circuit decision
24 looked at the very same Florida statute because the
25 removal proceeding had been initiated out in California --

1 so that's why the Ninth Circuit looked at the Florida
2 statute -- and found that it was not a crime of violence
3 because it did not have the element of the use of force.
4 It did, as you say, indicate that a recklessness standard
5 would satisfy a crime of violence in the Ninth Circuit.

6 JUSTICE SCALIA: And what about a drive-by
7 shooting into an occupied building?

8 MR. SOLLERS: A drive-by shooting into an
9 occupied building --

10 JUSTICE SCALIA: Right. You're not sure you're
11 going to hit anybody. You're not even sure there's
12 anybody in the building, but you drive by and you just
13 shoot a -- a bullet into the building.

14 MR. SOLLERS: I --

15 JUSTICE SCALIA: You -- you would say that the
16 -- is that covered by this statute? I'd certainly want
17 that --

18 MR. SOLLERS: Yes, Your Honor, absolutely.

19 JUSTICE SCALIA: Why is it?

20 MR. SOLLERS: It's intentional use of force.

21 JUSTICE SCALIA: Against a person. It has to be
22 the intentional use of force against a person. He didn't
23 -- he didn't intend to hit a person. He just didn't care
24 whether there was anybody there or not. It's the classic
25 recklessness case. Classic -- he didn't -- wasn't

1 shooting at any particular person. Just having a good old
2 time shooting out a window in a -- in a building. He
3 didn't know was anybody in there or not.

4 MR. SOLLERS: Your Honor, that is intentional
5 conduct that has a substantial likelihood of -- of causing
6 injury.

7 JUSTICE SCALIA: So is -- so is driving under
8 the influence. It seems to me --

9 JUSTICE SOUTER: I -- I thought your argument
10 was that there's got to be more than simply a risk of
11 causing injury. I thought your argument was that there
12 has got to be a risk of acting intentionally to cause
13 injury, as in the case of the burglar who suddenly is
14 surprised. Now -- now, which is it? Is it -- if -- if
15 it's merely causing injury, then you're in trouble under
16 part (b).

17 MR. SOLLERS: That's correct, Your Honor.

18 JUSTICE SOUTER: If it's causing -- if it's --
19 it's using force for the purpose of causing injury, then I
20 can see at least a consistent argument.

21 MR. SOLLERS: Your Honor, you are absolutely
22 correct. It is the use -- the intentional use of force
23 which causes injury, that is --

24 JUSTICE SCALIA: So you've changed your answer
25 to my previous question then.

1 MR. SOLLERS: I -- I may have, and if I did, I
2 -- I apologize. I may have misunderstood Your Honor,
3 but --

4 JUSTICE O'CONNOR: Well, so is recklessness
5 enough or not? I -- I don't understand what you're
6 saying.

7 MR. SOLLERS: Your Honor, our -- Justice
8 O'Connor --

9 JUSTICE O'CONNOR: The -- the shooting, random
10 shooting, in a building for target practice.

11 MR. SOLLERS: That is an intentional act. The
12 pulling of the trigger was an intentional act that has --

13 JUSTICE O'CONNOR: So is getting behind a wheel
14 when you're drunk and turning on the keys.

15 MR. SOLLERS: Yes, Your Honor. That is -- I --
16 I must distinguish the two however. I would suggest that
17 while absolutely a -- a regrettable and serious act to get
18 behind the wheel when one is drunk -- and we do not
19 condone that whatsoever -- the act of use of force that is
20 involved is at most negligence.

21 JUSTICE BREYER: I thought that what you were
22 saying, which I understood, is that if somebody
23 intentionally uses force and hurts somebody -- might hurt
24 somebody, that falls within the statute. If they do it
25 negligently, they don't. If they do it recklessly,

1 recklessly and often assimilated to intention in the law,
2 gross -- you know, recklessness and sometimes it isn't.
3 So I thought you were going to say we didn't have to
4 decide that one.

5 Many States require negligence only for drunk
6 driving hurting somebody. Some may require recklessness.
7 So we may have to decide it some day.

8 Now, that -- that's where -- that's where I came
9 into this argument. Now, if you're disowning that, I want
10 to know. If you're accepting it, I want to know.

11 MR. SOLLERS: I accept that, Your Honor, Justice
12 Breyer.

13 JUSTICE O'CONNOR: Yes, but what's your answer
14 on recklessness? That's fine. Maybe we don't have to
15 today, but we have to look ahead. What are we going to
16 say about it?

17 MR. SOLLERS: Your Honor, this case is based on
18 a -- an underlying statute that has no mens rea
19 requirement whatsoever, and a crime of violence requires
20 an intentional use of force.

21 The legislative history I believe dictates such
22 a conclusion. If you look at 18 U.S.C., section 16, its
23 origins were all -- was -- was -- the origin was the D.C.
24 Court Reform Act, which was a detention -- a detention
25 statute.

1 JUSTICE GINSBURG: You -- you responded --

2 JUSTICE BREYER: Your answer might be
3 recklessness. I mean, I think that's a hard question, but
4 -- but I guess you could say recklessness in respect to
5 shooting? Of course, it's covered. Recklessness in
6 respect to drunk driving? I'm not so sure. It may depend
7 on the nature of the crime, the nature of the underlying
8 conduct. But you may not accept that. You may want an
9 all or nothing answer, in which case you can answer. I'd
10 have to say I don't know.

11 JUSTICE GINSBURG: I thought you responded to
12 Justice Breyer's first inquiry reckless, at least maybe,
13 and if that was your answer, if I understood your -- that
14 you agreed with him, why isn't getting into a car when you
15 are drunk inherently reckless because you know there's a
16 high risk of hurting someone?

17 MR. SOLLERS: Your Honor, there is a continuum
18 -- there's no question about it -- of mens rea, beginning
19 -- you know, you have the strict liability offense all the
20 way to specific intent. I don't know where it falls to
21 get into a car when you're drunk, but I will suggest that
22 the analysis for this Court in determining whether or not
23 it's a crime of violence is to look at the underlying
24 statute. And the underlying statute does not require even
25 mere negligence for a conviction.

1 JUSTICE KENNEDY: But -- but that's because
2 there's always a substantial risk. Whether there's an
3 intent to be negligent or a likelihood of negligence or a
4 likelihood of risk, that's inherent in driving a car while
5 you're drunk. You want this Court to say, in effect, that
6 there is no substantial risk in drunk driving.

7 MR. SOLLERS: No, Your Honor. No, Justice --

8 JUSTICE KENNEDY: No substantial risk of use of
9 force.

10 JUSTICE STEVENS: May I ask this question about
11 substantial risk? Say it's -- there's always a
12 substantial risk when you get in the car and you're
13 intoxicated. Does it make any difference whether you
14 actually cause any injury or not? There are two drivers,
15 equally -- equally drunk and equally negligent. One hits
16 somebody and the other doesn't. Are they treated alike or
17 are they treated differently under the statute?

18 MR. SOLLERS: Well, under this particular
19 statute, it requires the causation of injury, but it's
20 simply a causation statute. It's the consequence. And
21 that's one of the elements of the offense. So it does
22 make a difference for this particular statute, otherwise I
23 assume you'd be convicted of simply DUI.

24 JUSTICE STEVENS: So if there's -- if there's
25 clearly the substantial risk but he was lucky enough not

1 to hit anybody, then he's not covered.

2 MR. SOLLERS: He'd be covered by a DUI --

3 JUSTICE STEVENS: I understand, but he would not

4 be covered --

5 MR. SOLLERS: -- if he was caught.

6 JUSTICE STEVENS: He would not be deportable.

7 MR. SOLLERS: Correct.

8 JUSTICE KENNEDY: But -- but why when the

9 statute says if the offense by its nature includes the risk?

10 MR. SOLLERS: Excuse me. I misanswered your

11 question. He would, under the determination in the

12 Eleventh Circuit, be deportable because they have found

13 that there is -- it is a crime of violence --

14 JUSTICE STEVENS: Whether or not you hit

15 anybody?

16 MR. SOLLERS: You don't necessarily have to hit

17 somebody. A lot of these cases actually look at straight

18 DUI offenses. A lot of these immigration cases are

19 involving straight DUI --

20 JUSTICE O'CONNOR: Well, excuse me. I thought

21 we were looking at aggravated felony, and does not Florida

22 make it a felony, a serious felony, if you cause serious

23 bodily injury? That's what puts it into the category of a

24 third degree felony. If you're just driving under the

25 influence, it doesn't appear to fall in that category.

1 Maybe I'm not reading it right --

2 MR. SOLLERS: I believe that's right.

3 JUSTICE O'CONNOR: -- but that's how I read the
4 Florida statute.

5 MR. SOLLERS: I believe that's right in Florida,
6 Justice O'Connor. That's correct.

7 But a moment ago, Justice Kennedy asked me a
8 question about substantial risk. And yes, Justice
9 Kennedy, there is a substantial risk of an accident from
10 getting behind the wheel when you're drunk. But we
11 suggest -- and -- and we believe that the -- the statutory
12 construction supports us -- that there is not a
13 substantial risk of the intentional use of force. And that's
14 -- that's the difference. It's the consequence.

15 In the cases -- a number of cases have,
16 improperly so, focused on the consequence, the actual
17 injury and not the actual use of force, which is the key
18 element under a crime of violence, 18 U.S.C., section 16,
19 which is what we're construing.

20 CHIEF JUSTICE REHNQUIST: Mr. Sollers if this were a
21 straight criminal statute and the arguments on each side
22 were very close, you would be entitled to rely on the rule
23 of lenity. This is just a reflection really of a criminal
24 statute. It's a deportation statute. Are you entitled to
25 rely on the rule of lenity here?

1 MR. SOLLERS: Yes, Your Honor. We -- first of
2 all, I would say that we do not need to rely on the rule
3 of lenity because the straight language of the statute
4 supports our position. There is no element in the Florida
5 statute, use of force. However, if it's a close call, we
6 would be able to rely on the rule of lenity. This is a
7 most severe, severe punishment that is --

8 CHIEF JUSTICE REHNQUIST: No, but it's -- it's
9 never been regarded as criminal, a deportation proceeding.

10 MR. SOLLERS: That is not, but, of course, 18
11 U.S.C., section 16 is the criminal statute, and that is
12 what we're here to decide, the reach of 18 U.S.C. 16.

13 JUSTICE SCALIA: Well, it -- it doesn't impose
14 criminal penalties on its own. Is it used in other
15 criminal statutes that do impose criminal penalties?

16 MR. SOLLERS: Absolutely. It's used in --

17 JUSTICE SCALIA: Okay. Well, that's -- that's
18 your answer, that -- that you can't interpret section 16
19 one way for purposes of deportation statutes and another
20 way for purposes of criminal statutes. And therefore, the
21 rule of lenity does apply.

22 MR. SOLLERS: Absolutely, Your Honor.

23 JUSTICE KENNEDY: Does the rule of lenity apply
24 in sentencing statutes as opposed to the definition of
25 crimes? I don't -- I don't know.

1 MR. SOLLERS: I don't know the answer to that.
2 I -- you know, I know the rule of lenity is to be applied
3 to criminal statutes. I am not sure on sentencing
4 statutes.

5 But I will say that -- you know, we are not
6 saying that someone who gets behind a wheel who's drunk
7 should not be punished. My client spent 2 years in jail
8 and was immediately taken to INA facility and -- and kept
9 there for several months before he was shipped back to
10 Haiti, where he remains now. So it is not as if he has
11 not paid a -- a severe price for what he did.

12 JUSTICE SCALIA: Mr. Sollers, let -- let me ask
13 you about the recklessness problem that -- that a number
14 of us have. You -- you insist on -- on defining the crime
15 of violence as one that requires the intentional
16 application of force against an individual. Why -- why do
17 you need that in order to win your case? Why couldn't you
18 just define it as the intentional -- the intentional --
19 use of a mode of force that is likely to injure an
20 individual?

21 Now, driving on a highway is not -- is not
22 likely to injure an individual. Shooting a gun into --
23 into a building is likely to -- to injure an individual.
24 Why shouldn't that be the -- the distinction? Either you
25 intend to use it against a person or you have

1 intentionally used a mode of force that is in its nature
2 likely to injure a person, not caring whether it does or
3 not.

4 MR. SOLLERS: I understand your question,
5 Justice Scalia. I -- you know, our analysis is strictly
6 on the statute itself, 18 U.S.C., section 16, which
7 requires as an element the use of force or a substantial
8 risk that force -- that the use of force may occur. And
9 in our view, this -- getting in a car while -- any driving
10 certainly involves risk. There's no question about that,
11 and it's enhanced if one is intoxicated. But it is not --
12 not the case that Congress intended that drunk driving
13 offenses and accidents relating from a drunk driving
14 offense should trigger the draconian remedy of removal.
15 And that -- that's what our position is.

16 JUSTICE STEVENS: Just -- just following up on
17 Justice Scalia's question, the point would be that
18 shooting a gun is the threatened use of -- of physical
19 force against a person or property. Getting into a car is
20 not the threatened use of physical force against anything.

21 MR. SOLLERS: It's not the intentional use of
22 any force. That's correct, Your Honor.

23 JUSTICE KENNEDY: But why don't we interpret it
24 as getting into a car while drunk and, as Justice O'Connor
25 points out, while drunk and causing an injury? Otherwise,

1 the statute isn't even applicable.

2 MR. SOLLERS: Well, certainly there is an
3 enhanced risk from getting into the car while you're
4 drunk. However, again, the Florida statute and statutes
5 like it across the country do not have any mens rea
6 element whatsoever required for conviction. Therefore,
7 it's not subsumed by 18 U.S.C., section 16, which requires
8 use of force as an element.

9 If one looks at the aggravated felonies that
10 have been added, on four of five occasions the list of
11 aggravated felonies have been added to the INA. Never has
12 a non-intent crime been added. There have been multiple
13 occasions in which Congress has had the opportunity to
14 specifically add DUI offenses. They have never been
15 added. If one looks at the INA and the addition of
16 serious offenses for which an alien can be inadmissible,
17 that addition in 1990 -- and the Congress specifically
18 listed separately DUI offenses, DUI-type offenses, and
19 crimes of violence, showing that Congress did not believe
20 that DUI offenses were subsumed by 18 U.S.C., section 16.

21 JUSTICE GINSBURG: The Government suggests that
22 Congress in an excess of caution might have listed DUI
23 because -- because the decisions in the lower courts were
24 divided on the question of the correct categorization.

25 MR. SOLLERS: That is --

1 JUSTICE GINSBURG: And then it would do nothing
2 -- it would have changed nothing. It just would have been
3 clarified.

4 MR. SOLLERS: Well, there is no legislative
5 history that -- to indicate that Congress so thought.
6 Certainly that is a hypothetical possibility. We do not
7 believe that's the case. If you look later on in 1990,
8 crimes of violence were specifically added as aggravated
9 felonies, and the -- the Congress did not add DUI offenses
10 along with the crimes of violence. They simply added 18
11 U.S.C., section 16.

12 If I may, I'm going to reserve the rest of my
13 time.

14 CHIEF JUSTICE REHNQUIST: Very well, Mr.
15 Sollers.

16 Mr. Himmelfarb, we'll hear from you.

17 ORAL ARGUMENT OF DAN HIMMELFARB

18 ON BEHALF OF THE RESPONDENTS

19 MR. HIMMELFARB: Mr. Chief Justice, and may it
20 please the Court:

21 Drunk driving that kills or seriously injures
22 another person is a serious offense. It is a violent
23 offense in the ordinary sense of that term, and it
24 satisfies the statutory definition of crime of violence.

25 The felony offense of which petitioner was

1 convicted by its nature involves a substantial risk that
2 physical force may be used against the person or property
3 of another.

4 CHIEF JUSTICE REHNQUIST: You say used against
5 the person. Doesn't that connote some more intent than
6 there is here?

7 MR. HIMMELFARB: We don't think so, Mr. Chief
8 Justice. Statutory terms take their meaning from context,
9 and in the context of section 16, we think the better
10 reading of use is that it doesn't require any particular
11 mens rea. The thing that's being defined in section 16 is
12 a crime of violence and violence does not have any
13 particular mens rea associated --

14 JUSTICE KENNEDY: I -- I have to tell you. In a
15 -- in a traffic court where we see all too many drunk
16 driving cases go through the calendar, no injury is
17 involved. I recognize there is in this case. In the --
18 in the drunk driving case without -- without any
19 aggravating factors, I just don't think judges think of
20 those as crimes of violence.

21 MR. HIMMELFARB: Well --

22 JUSTICE KENNEDY: Do you -- do you tell your
23 family I committed a crime of violence?

24 MR. HIMMELFARB: There are a few things to be
25 said about the simple offense of drunk driving, not the

1 aggravated offense. The first is that --

2 JUSTICE KENNEDY: And -- because I thought
3 your opening remarks were applicable to drunk driving
4 as an offense generically and -- and as a whole.

5 MR. HIMMELFARB: Well, Justice Kennedy, we have
6 taken that position in the lower courts and before the
7 Board of Immigration Appeals. It's not necessary for the
8 Court to agree with that position in order for us to
9 prevail here. As an initial matter, the simple offense of
10 drunk driving is ordinarily a misdemeanor, and since it
11 doesn't have force as an element, it could only be a crime
12 of violence if it fell under 16(b) which covers only
13 felonies.

14 CHIEF JUSTICE REHNQUIST: Yet the mental state
15 is presumably the same whether it's drunken driving
16 without injury or drunken driving with injury.

17 MR. HIMMELFARB: That's true, Mr. Chief Justice.
18 That's not the distinction we're drawing.

19 CHIEF JUSTICE REHNQUIST: I know you're not, but
20 why -- why don't you?

21 (Laughter.)

22 MR. HIMMELFARB: Well, we think the -- when I
23 say that the Court need not agree with us that simple
24 drunk driving is a crime of violence in order to hold that
25 drunk driving resulting in serious injury is, I say that

1 because if you take the view that physical force requires
2 an actual crash, which is petitioner's view, which is the
3 narrow understanding of the term physical force, it may or
4 may not be the case -- it is a debatable proposition --
5 that if you're simply driving drunk, there's a substantial
6 risk you're going to crash into somebody. Somebody might
7 make the argument that while there's a risk, it's not a
8 substantial risk.

9 JUSTICE SCALIA: Of course, it certainly would
10 come within (a). It certainly would come within (a). An
11 offense -- it doesn't have to be a felony to be within
12 (a). An offense that has as an element the threatened use of
13 physical force against the person or property of another.

14 MR. HIMMELFARB: Well, Justice Scalia, we read
15 threatened use and attempted use to require intentional
16 conduct. So we don't --

17 JUSTICE SCALIA: Oh. So you need intent for (a)
18 but you don't need intent for (b).

19 MR. HIMMELFARB: No. You need intent under (a)
20 for a threat or an attempt because a threat or an attempt
21 by its nature is an intentional act. But the use of
22 physical force in either (a) or (b) is not by its nature
23 an intentional --

24 JUSTICE SCALIA: Well, then -- then you -- then
25 you think (a) does not apply to ordinary DUI.

1 MR. HIMMELFARB: That's right. That was my
2 position.
3 JUSTICE SCALIA: Oh. I thought your -- I
4 thought your position was that ordinary DUI is a crime of
5 violence.
6 MR. HIMMELFARB: We have taken that position in
7 the lower courts.
8 JUSTICE SCALIA: But you don't believe it.
9 (Laughter.)
10 MR. HIMMELFARB: We believe -- our position in
11 the lower courts is that it's a crime of violence under
12 16(b), but there are arguments -- the argument the other
13 way --
14 JUSTICE SCALIA: Wait, wait, wait. Ordinary DUI
15 is a crime of violence under 16(b).
16 MR. HIMMELFARB: That's right.
17 JUSTICE SCALIA: It's not a felony. Ordinary
18 DUI is not a felony.
19 MR. HIMMELFARB: If it's a misdemeanor, it
20 couldn't be a crime of violence under (a) because force
21 isn't an element and under (b) because it's not a felony.
22 JUSTICE SCALIA: Okay.
23 MR. HIMMELFARB: There are --
24 JUSTICE SCALIA: That -- that is your current
25 position and -- and we can take that.

1 MR. HIMMELFARB: No. My position is that the
2 Court doesn't have to reach the question of whether drunk
3 driving without the aggravated injury element is a crime
4 of violence.

5 JUSTICE SOUTER: Maybe -- maybe we do and -- and
6 this depends on -- on something I just don't know. Maybe
7 you do. Are there States that define the second or a
8 third subsequent DUI offense as felonious rather than
9 misdemeanor?

10 MR. HIMMELFARB: Yes, there is.

11 JUSTICE SOUTER: Then -- then we do have to
12 reach that issue because those would qualify as felonies,
13 and on your analysis of (b), which doesn't require intent,
14 they -- they would -- they would fall under (b).

15 MR. HIMMELFARB: That's right. There are
16 simple --

17 JUSTICE SOUTER: I just want to make sure I
18 understand it. So that if we accept your position and
19 there are States that -- that do classify subsequent
20 offenses as felonies regardless of injury, there would be
21 some DUI offenses without injury that would be crimes of
22 violence and -- and a basis for deportation.

23 MR. HIMMELFARB: That is our position. It's
24 also our position that the Court need not accept it in
25 order for us to prevail in this case. There is a

1 difference between the sort of driving that takes place
2 when somebody simply drives drunk and doesn't cause an
3 injury and the sort of driving that takes place when
4 somebody not only drives drunk but injures another person.
5 If somebody is driving and swerving or driving and falling
6 asleep at the wheel or driving and doing any of the
7 things --

8 JUSTICE GINSBURG: He might be lucky and
9 nothing happens. I mean, that's the -- the problem thing.
10 Two people who engage in identical conduct, one has the
11 misfortune to hit someone, the other doesn't, but they're
12 both equally swerving in and out. The -- the distinction
13 is whether someone is hit.

14 And in that light, suppose there were an
15 involuntary manslaughter conviction for someone who was
16 speeding but cold sober, speeding, cold sober, and killing
17 someone because he couldn't stop the car fast enough.
18 Would that also be a crime of violence?

19 MR. HIMMELFARB: We think it would be, Justice
20 Ginsburg. And to respond to your first question, the
21 distinction between those two situations is that you have
22 to look not at the underlying conduct to decide whether
23 something is a crime of violence, but you have to look at
24 the offense with which the defendant was charged and of
25 which he was convicted and see what the elements are and

1 what the risk is by its nature. So if somebody is charged
2 and convicted simply of simple driving under the
3 influence, that crime by its nature may or may not involve
4 a substantial risk of force even though in a particular
5 case someone might be swerving. But if there's injury,
6 the crime by its nature has to entail the sort of driving
7 beyond the ordinary drunk driving offense --

8 JUSTICE SCALIA: That's simply --

9 JUSTICE KENNEDY: Well, then -- then the word
10 substantial risk does no work in -- in that -- in the --
11 in the case that Justice Ginsburg put. We just ignore
12 substantial risk.

13 MR. HIMMELFARB: No, we don't think you do,
14 Justice Kennedy. My point is that --

15 JUSTICE KENNEDY: Why do we need substantial
16 risk? They hit -- they hit somebody. We know they hit
17 somebody. That's it.

18 MR. HIMMELFARB: Well, here -- here's the --

19 JUSTICE KENNEDY: And the question is, what
20 about her other hypothetical where the person is driving
21 90 miles an hour and hits no one?

22 MR. HIMMELFARB: Well, our --

23 JUSTICE KENNEDY: There's still a substantial
24 risk.

25 MR. HIMMELFARB: -- our primary submission is

1 that the crime at issue here falls under 16(a) because the
2 use of force is an element because if you're driving
3 drunk, you can't injure somebody without using force. But
4 our fallback position is that even if, as petitioner
5 contends, the only time you use force in the drunk driving
6 context is when you actually crash your car into somebody,
7 and he hypothesizes these types of injuries which in his
8 view don't involve physical force. There is, at a
9 minimum, going to be a substantial risk that you will
10 crash your car into somebody if you're not only driving
11 drunk, but driving drunk in a way that results in injury
12 no matter how the injury is caused.

13 JUSTICE SCALIA: If your primary position is
14 (a), then -- then I think you're back to the -- to the
15 situation that ordinary DUI would come under (a). It has
16 as an element the threatened use of physical force.

17 MR. HIMMELFARB: No. We don't rely on the
18 threat -- the threat language in 16(a), Justice Scalia.
19 We rely on use. If you drive drunk and you injure
20 somebody, you're using physical force against that person.
21 But even --

22 JUSTICE SCALIA: I see. I see.

23 JUSTICE STEVENS: But in your submission, as I
24 understand it, the attempted use or threatened use is
25 really a worse offense than the use because it involves

1 intent, whereas use doesn't necessarily involve actual
2 intent.

3 MR. HIMMELFARB: Well, I don't -- I don't think
4 the measure of the seriousness of a crime --

5 JUSTICE STEVENS: Except what we're really looking
6 at here, when you get all done with all this, is is this a
7 person who should be sent back to Haiti because of this
8 particular act that occurred. And the irony of it, it
9 seems to me, is that in terms of moral culpability and --
10 and the kind of person we don't want to stay in this
11 country, it doesn't really make any difference whether he
12 hit somebody when he was drunk or not.

13 MR. HIMMELFARB: Well, Justice Stevens, I think
14 that's an important point. We don't think that mens rea
15 is the measure of the seriousness of a crime. There are a
16 number of crimes that are indisputably crimes of violence
17 under petitioner's view that are mens rea crimes that, in
18 the scheme of things, people would think are not as
19 serious as drunk driving resulting in serious --

20 JUSTICE SCALIA: What -- what are they? What
21 are they?

22 MR. HIMMELFARB: Well, for example, simple
23 misdemeanor assault would be a crime of violence under
24 16(a).

25 JUSTICE SCALIA: Well, of course. It's a crime

1 of violence because you intend to apply force to the body
2 of another person.

3 MR. HIMMELFARB: Well, that's right, Justice
4 Scalia, but for example, reckless homicide, a depraved
5 heart murder, which in most States is second degree
6 murder, under petitioner's view of things --

7 CHIEF JUSTICE REHNQUIST: A depraved heart
8 murder?

9 MR. HIMMELFARB: Yes, Mr. Chief Justice.

10 CHIEF JUSTICE REHNQUIST: What sort of a murder
11 is that?

12 MR. HIMMELFARB: That's a -- that's a -- that's
13 the -- the -- I think the common law term for reckless
14 homicide.

15 CHIEF JUSTICE REHNQUIST: A malignant and
16 abandoned heart is what we learned in law school.

17 (Laughter.)

18 MR. HIMMELFARB: I think that's -- that's the
19 same thing, Mr. Chief Justice.

20 But in any event, that doesn't require
21 intentional conduct. That requires only recklessness.

22 JUSTICE BREYER: That's why, I guess, reckless
23 is a harder matter.

24 But you started with context, and when I looked
25 at the context of this statute, the context to me seemed

1 to be that this is not -- this is a statute that has
2 nothing to do with immigration. 16 is a definition that's
3 a kind of receptacle that other statutes refer to. And it
4 was part of the original criminal code reform in the
5 '80's. And the purpose of that was to pull together words
6 that are similar throughout the U.S. Code and give them a
7 common definition. And the history of this refers back to
8 the D.C. Code. The history of this and other similar
9 language in the code makes clear that what they're talking
10 about are things like murder, manslaughter, burglary,
11 robbery, extortion, blackmail. They give examples for all
12 these things elsewhere in the code with similar language.

13 So if I look at the context, the context to me
14 says, though the language can be read to cover it, this
15 has nothing to do with drunk driving. Now, that's when
16 you talk about context. I have that in my mind as
17 context. Now, you tell me why I'm wrong.

18 MR. HIMMELFARB: Well, I think there are a
19 couple of reasons why you're wrong. The first is that
20 insofar as section 16 was based in whole or in part on the
21 D.C. Code provision, the D.C. Code provision listed
22 specific crimes. Congress did not do that. It had two
23 general definitions. So it's perfectly reasonable to
24 think that Congress would be aware that it would be
25 foreseeable to Congress that the general definitions, the

1 general language it was using might pull in some crimes
2 that were not among those listed in the D.C. Code
3 provision.

4 The second point is that the very first crime
5 listed in that D.C. Code provision is murder, and as I've
6 just said, second degree murder includes in many
7 jurisdictions reckless homicide.

8 JUSTICE BREYER: No. I -- I put aside the
9 reckless argument, and I'm not relying on the D.C. Code.
10 That was but one example.

11 I'm saying this same language appears elsewhere
12 in the U.S. Code, 924(e). Wherever it does appear, they
13 list things like burglary, arson, extortion, explosives,
14 and otherwise. And there's no indication that this is
15 meant to be something different and there's every
16 indication from the purpose of it being written in the
17 criminal code reform that Congress is seeking a common
18 definition. That's what's moving me.

19 So your response to that is what?

20 MR. HIMMELFARB: Well, insofar as the issue is
21 whether Congress could have had this type of crime in
22 mind, we think the answer is yes.

23 JUSTICE BREYER: Yes, it could have. I'm saying
24 it didn't have.

25 MR. HIMMELFARB: Well, let me -- let me rephrase

1 the question and the answer.

2 JUSTICE BREYER: I want your evidence that it
3 did have.

4 MR. HIMMELFARB: Insofar as the issue is whether
5 Congress did have this type of crime of mind, we think the
6 answer is yes.

7 JUSTICE BREYER: Because?

8 MR. HIMMELFARB: Because a -- a -- the classic
9 example of a crime of violence, as you have just pointed
10 out, is murder, and as I've said, reckless homicide is a
11 form of murder. The definition of use that petitioner is
12 advancing is to employ something for a purpose. So the
13 mens rea that he advocates be -- be read into the statute
14 is purposefulness, and it's not at all clear that
15 recklessness, which is a lesser form of mens rea, fits at
16 all comfortably with the concept of purposefulness.

17 JUSTICE STEVENS: May I ask you a question?
18 Maybe I'm repeating a little bit of what Justice Breyer
19 asked. But in the blue -- statutory appendix to the blue
20 brief, they quote from section 101, and they point out
21 that the term aggravate -- of the INA -- the term
22 aggravated felony means either a -- for purposes of 1182(e),
23 either any felony -- any crime of violence or, 3, a crime
24 of reckless driving described as intoxicated. And it
25 seems to me that statute draws a rather sharp distinction

1 between crime of violence as defined in section 16 of
2 title 18, on the one hand, and reckless driving that we're
3 talking about in this case, on the other, which suggests
4 to me that maybe Congress thought the two were different.

5 MR. HIMMELFARB: Well, we don't -- we don't
6 think it does, Justice Stevens, and -- and that's even
7 apart from the fact that the Congress that enacted that --

8 MR. HIMMELFARB: -- statute was a different
9 Congress from the one that enacted section 16.

10 But the -- the thrust of petitioner's argument
11 under 1101(h) is that if you interpret a crime of violence
12 to include drunk driving resulting in bodily injury, you
13 will render 1101(h)(3) essentially superfluous.

14 JUSTICE SCALIA: I -- I don't think your -- your
15 that was a different Congress argument carries much
16 weight. We don't usually interpret the United States Code
17 to be chaotic because each of the sections has been
18 enacted by a different Congress. We try to reconcile the
19 whole thing.

20 MR. HIMMELFARB: Well, that --

21 JUSTICE SCALIA: And I think it -- it is telling
22 that this thing does seem to separate reckless driving
23 from -- from a crime of violence.

24 MR. HIMMELFARB: Well, that's the point I was
25 just about to make, Justice Scalia, and we think it does

1 separate the two, and there is no overlap. There is some
2 overlap, but there's not complete overlap.

3 JUSTICE SCALIA: Do you agree that -- that the
4 rule of lenity applies?

5 MR. HIMMELFARB: Well, it -- it applies in the
6 sense that if, at the very end of the interpretive
7 process, the Court is left with a grievous doubt as to
8 which way it should rule, yes. It doesn't apply in the
9 sense that we don't think there is a grievous doubt in the
10 case.

11 JUSTICE GINSBURG: Would you say the same thing
12 about -- isn't there also a principle that in deportation
13 statutes, ambiguities are to be construed in favor of the
14 alien?

15 MR. HIMMELFARB: Justice Ginsburg, there is, to
16 be sure, language in this Court's decisions suggesting
17 that. We have never agreed with that view. We think the
18 immigration context is very different from the criminal
19 context.

20 JUSTICE SCALIA: Well, what difference does it
21 make if you concede the rule of lenity, which says the
22 same thing? Ambiguities are to be resolved in favor of
23 the --

24 MR. HIMMELFARB: It -- it doesn't, Justice
25 Scalia. Our only point --

1 JUSTICE SCALIA: They're the same.

2 MR. HIMMELFARB: Our only point is that if -- if
3 the rule of lenity is to be applied here, we think that
4 the basis for applying it is that we're dealing with a
5 criminal statute, not that we're dealing with a criminal
6 statute incorporated into the immigration laws.

7 I do want to say a little bit more about the --
8 the text and statutory context definition of crime of
9 violence. Apart from the thing that's being defined,
10 crime of violence -- and as I've said, we don't think that
11 the word violence has any mens rea necessarily associated
12 with it. The definition of the thing that's being defined
13 is the use of physical force --

14 CHIEF JUSTICE REHNQUIST: You say the word
15 violence doesn't. And I think you're probably right.
16 There are all sorts of violent things that happen. But
17 you're dealing with the phrase, crime of violence. And
18 more often than not, crime does have.

19 MR. HIMMELFARB: That's exactly right, Mr. Chief
20 Justice. Crime, more often than not, does but it doesn't
21 always. So we think the focus should be on whether the
22 crime involves violence, which we think is essentially an
23 actus reus and not a mens rea.

24 CHIEF JUSTICE REHNQUIST: What does actus reus
25 mean?

1 MR. HIMMELFARB: Actus reus means the actual
2 criminal conduct as opposed to the defendant's state of
3 mind when he's carrying out that conduct.

4 And since legislatures do regulate -- do impose
5 criminal liability for violent acts and they have varying
6 degrees of mens rea in those criminal definitions, we
7 don't think that a mens rea should be read into this
8 statute.

9 JUSTICE SCALIA: You say if I bump into somebody
10 getting off the bus, I've -- I've committed, as far as
11 actus reus is concerned, an act of violence. Right?

12 MR. HIMMELFARB: No, Justice Scalia.

13 JUSTICE SCALIA: I say, excuse me, but --

14 MR. HIMMELFARB: We don't think so. The --

15 JUSTICE SCALIA: I committed -- committed an act
16 of violence.

17 (Laughter.)

18 JUSTICE SCALIA: This is just not normal use of
19 language.

20 MR. HIMMELFARB: Courts -- courts have generally
21 read use of physical force in section 16 to mean something
22 more than force in a literal or a scientific sense. Force
23 in this context means violent or force that has the risk
24 of causing injury. Now --

25 JUSTICE SCALIA: I bump into him really hard,

1 really hard. He falls down. I've committed an act -- an
2 act of violence?

3 MR. HIMMELFARB: Well, of course, Justice
4 Scalia, you would have to have a legislature criminalizing
5 that conduct, and I think it's very unlikely --

6 JUSTICE SCALIA: I'm not talking about
7 criminalizing. I'm just talking about normal English
8 usage. Would you say that I committed an act of violence?
9 I don't think so.

10 MR. HIMMELFARB: I --

11 JUSTICE SCALIA: I don't care how hard I -- I
12 accidentally bumped into him. You wouldn't say, you know,
13 Scalia -- he's a violent man.

14 (Laughter.)

15 MR. HIMMELFARB: Justice Scalia, if two
16 outfielders are chasing after a fly ball and they crash
17 into each other, the next day in the newspaper you may
18 well read a headline that talks about a violent crash in
19 the outfield during that game. I don't think it does any
20 violence, if you'll forgive the expression --

21 (Laughter.)

22 MR. HIMMELFARB: -- to ordinary English usage to
23 say that when there is a collision between cars, when
24 there is a collision between athletes who are running at
25 full speed, that is a violent act.

1 JUSTICE SOUTER: No, no.

2 JUSTICE KENNEDY: So you think it's standard --

3 JUSTICE SOUTER: It is a violent result.

4 Yes, a violent crash. You're right. They'd say that in
5 the paper. But they wouldn't say that the two players were
6 committing acts of violence.

7 JUSTICE SCALIA: It's a totally different
8 meaning of violence. You can talk about a violent wind.

9 (Laughter.)

10 JUSTICE SCALIA: It -- it has nothing to do with
11 when you're talking about a violent act in the sense of --
12 of crime.

13 MR. HIMMELFARB: Well, I've been -- I've been
14 speaking of the thing that's being defined. I want to
15 speak some more about the definition that's really the
16 ultimate statutory language that's being interpreted,
17 which is use of physical force.

18 In the context of section 16, we think that the
19 use of physical force means the application, the exertion,
20 the putting into action of physical force, and in the
21 absence of some specification of a purpose, for example,
22 the use of physical force to subdue an attacker or to gain
23 entry to a building, we don't think that the exertion,
24 application, or putting into action of physical force has
25 any particular mens rea associated with it.

1 JUSTICE BREYER: Why in the -- in the House --
2 in the Senate report on this bill, the example that they
3 use for the first is an assault or a battery. Nobody has
4 used, you know, blindly in your sleep knocking over a
5 table and --

6 MR. HIMMELFARB: Well, that -- that wouldn't be
7 a crime, of course, Justice Breyer.

8 JUSTICE BREYER: No. Right.

9 MR. HIMMELFARB: An assault --

10 JUSTICE BREYER: I mean, it's pretty hard to
11 assimilate your model to like an assault.

12 MR. HIMMELFARB: Well, the -- our essential
13 point is that legislatures define crimes with all sorts of
14 mens rea, ranging from specific intent on one end of the
15 spectrum to strict liability on the other. And sometimes
16 the thing that is being prohibited involves violence and
17 sometimes it doesn't. DUI manslaughter, DUI resulting in
18 serious injury is a classic example of a case where the
19 thing that is being criminalized, the act, is violent but
20 the mens rea is not an intent mens rea.

21 JUSTICE SCALIA: What about negligent homicide?
22 You -- you absent mindedly don't see a stop sign. You go
23 through the stop sign and someone is killed or just
24 injured. Someone is injured through your negligence
25 driving a car. Is that -- under your definition, that's a

1 crime of violence.

2 MR. HIMMELFARB: I think -- I think we would

3 have to agree with that, Justice Scalia.

4 JUSTICE SCALIA: Yes, I think you would, and

5 boy, that's a --

6 JUSTICE BREYER: So every driving accident is a

7 crime of violence --

8 MR. HIMMELFARB: Well, no, Justice Breyer.

9 JUSTICE BREYER: -- if there's negligence

10 involved.

11 MR. HIMMELFARB: Most driving accidents aren't

12 criminal at all. It -- it takes --

13 JUSTICE BREYER: But any -- any one that is

14 criminal -- let's see. Criminal negligence in respect to

15 driving becomes a crime of violence under your definition.

16 MR. HIMMELFARB: I don't -- I don't know that

17 legislatures generally criminalize most car accidents.

18 JUSTICE BREYER: And why isn't it if there's a

19 traffic infraction involved? A traffic infraction -- you

20 went through a stop sign. In Justice Scalia's example, he

21 went through a stop sign.

22 MR. HIMMELFARB: I don't -- I don't think that

23 would be a felony or even a misdemeanor.

24 JUSTICE SCALIA: It doesn't have to be a felony.

25 JUSTICE BREYER: It doesn't have to be.

1 JUSTICE SCALIA: It just has to be an offense.
2 It's certainly an offense.

3 MR. HIMMELFARB: I think a traffic infraction
4 probably would not be even a misdemeanor. So there's a
5 whole set of driving infractions that wouldn't even rise
6 to the level of a misdemeanor.

7 JUSTICE SOUTER: I don't know, and if you're
8 going to -- if you're -- you're making an argument based
9 on what the language read most broadly can accommodate,
10 and if we're going to follow that criterion, then the --
11 the reference to the -- to the infraction in (a) is
12 offense. An offense is certainly broad enough to -- to
13 include driving infractions, as well as misdemeanors. I
14 mean, if -- if you want a broad interpretation, you're
15 going to pick up a lot.

16 MR. HIMMELFARB: Well, I'm -- I'm not sure we
17 are, Justice Souter, because a traffic infraction would
18 not have as an element the use of force. If you drive
19 through a stop sign and you're cited for driving through a
20 stop sign, the offense you're cited for would not have an
21 element --

22 JUSTICE SOUTER: The offense you're -- you're
23 cited for is driving your car through the stop sign and
24 you've just been telling us that -- that using an
25 automobile is inherently a use of force. Sure, it would

1 cover it.

2 MR. HIMMELFARB: No. No, Justice Souter. We --
3 we agree that the use of force has to be directed against
4 another person.

5 CHIEF JUSTICE REHNQUIST: Well, the offense
6 you're cited for in Justice Scalia's hypo is negligent
7 homicide, not going through a stop sign.

8 MR. HIMMELFARB: That's right.

9 JUSTICE SCALIA: That's right, but you -- you
10 agree negligent homicide would -- would be covered.

11 MR. HIMMELFARB: We do. We do.

12 I just want to say one last thing about the
13 other part of this case. Most of the discussion has been
14 about whether use requires intent. Petitioner actually makes
15 two alternative arguments. One has to do with the meaning
16 of the word use. The other has to do with the meaning of
17 physical force.

18 We don't think that the physical force part of
19 this case is truly in dispute. His view is that physical
20 force requires that the driver actually crash into
21 somebody, but we think that if you're --

22 JUSTICE SOUTER: No. He said his view is that
23 the -- that the physical force requires an element of
24 intent, which you dispute.

25 MR. HIMMELFARB: That's true, Justice Souter. I

1 was --

2 JUSTICE SOUTER: He's making the -- he's making
3 the same argument that Justice Holmes said the dog
4 understands, the difference between getting tripped over
5 and kicked. And -- and you're saying no. The dog's
6 perception doesn't count in -- in the -- the
7 interpretation of -- of using force.

8 MR. HIMMELFARB: I agree he's making an argument
9 about the requirement of intent which he thinks the word
10 use encompasses. He's also making an alternative
11 argument, which is whether or not use requires intent, the
12 crime does not have as an element the use of physical
13 force because you could injure somebody by driving drunk
14 without the use of physical force. And he gives examples
15 of how you could do that.

16 Our position is that even if those examples he
17 gives, for example, swerving and forcing somebody off the
18 road or falling asleep at the wheel and having somebody
19 else crash into you, even if those examples do not, by
20 themselves, involve the use of -- involve physical force,
21 it's our view that if you're driving drunk and you're
22 doing those things, there's a substantial risk of physical
23 force.

24 So on the physical force part of the case, we
25 think we win under 16(b), which means that the only issue

1 that's really in dispute between the parties is whether
2 use requires intent. And for all the reasons in our brief
3 and the reasons I've given today, I think our position is
4 correct.

5 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
6 Himmelfarb.

7 Mr. Sollers, you have 4 minutes remaining.

8 REBUTTAL ARGUMENT OF JOSEPH S. SOLLERS, III

9 ON BEHALF OF THE PETITIONER

10 MR. SOLLERS: Very briefly. On Justice Scalia's
11 drive-by shooting example, that would be absolutely a use
12 of force that has an element, the attempted use or
13 threatened use of physical force against a person or property
14 of another.

15 Respondent's position, as -- as I listened to
16 it, would require, as I think the Court fleshed out, that
17 if someone is speeding or someone runs a stop sign and
18 gets in an accident and there's -- and someone is -- is
19 killed, that's an involuntary homicide or negligent
20 homicide, and that would be a crime of violence for which
21 someone would be removed.

22 JUSTICE SCALIA: Or even injured I suppose.

23 MR. SOLLERS: Or even injured, quite possibly,
24 yes, Your Honor, depending on how it's charged.

25 And we do not believe that Congress in any way

1 contemplated that such an offense would lead to such a
2 draconian result.

3 There was considerable discussion about the
4 difference between the use of force and consequence. And
5 indeed, the circuit courts of appeals decisions that
6 respondent can cite have confused the difference between
7 the consequence of an act and the -- the use of force.
8 The Le decision in the Eleventh Circuit, as well as the
9 Tapia-Garcia decision in the Tenth Circuit, both confused
10 use of force with causation of injury. And even in the
11 Tenth Circuit, the Tapia-Garcia case has now been
12 disfavored by a subsequent panel in Lucio-Lucio that
13 focused on use of force, and the chief judge in the Tenth
14 Circuit was, in fact, on both panels.

15 So in closing, I would simply indicate to the
16 Court that this is a momentous decision. There is a
17 tremendous amount of -- there are a tremendous number of
18 ramifications that stem from the findings that a DUI type
19 offense is a violent felony under 18 U.S.C., section 16,
20 and we -- we recommend and --

21 JUSTICE SCALIA: What other consequences besides
22 deportation?

23 MR. SOLLERS: Your Honor, there are -- the
24 statute is -- 18 U.S.C., section 16 is subsumed in a
25 number of different other statutes.

1 JUSTICE SCALIA: Such as.

2 MR. SOLLERS: There -- RICO actually subsumes
3 crime of violence. The ownership of body armor, believe
4 it or not, subsumes crime of violence. You're not allowed
5 to own body armor. There are a number of -- a whole array
6 of different statutes.

7 Accordingly, the Government is -- has attempted
8 to expand the reach of 18 U.S.C., section 16 well beyond
9 the bounds of what Congress contemplated. By parsing the
10 word use and blurring the meaning of intentional conduct,
11 the Government would seek to have lawful, permanent
12 residents such as our client removed under these
13 circumstances. And we respectfully urge this Court to
14 reject the ill-founded position of the Government.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Sollers.

18 The case is submitted.

19 (Whereupon, at 10:59 a.m., the case in the
20 above-entitled matter was submitted.)

21

22

23

24

25